

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

AGRI SYSTEMS,

Debtor.

Case No. **04-60069-11**

O R D E R

At Butte in said District this 14th day of December, 2005.

In this Chapter 11 bankruptcy, after due notice, a hearing was held December 13, 2005, in Billings on the Motion for Approval of Request for Payment of Administrative Claim filed by Greg Braun, Plan Agent for Coast Grain (“Coast Grain”) on October 25, 2005, wherein Coast Grain seeks payment for a discovery sanction of \$18,063.50 against Debtor as set forth in an order entered by the United States District Court, Eastern District of California, Fresno Division. Debtor was represented at the hearing by attorneys Jon Doak and Mark D. Parker. Coast Grain was represented by attorneys Justin Harris and Steven McGee. Neither Debtor nor Coast Grain called a witness at the hearing and no exhibits were offered into evidence.

Debtor and Coast Grain have been involved in contentious litigation since before the inception of this bankruptcy case and Coast Grain has opposed every effort made by Debtor to reorganize. In fact, Coast Grain was the only entity that objected to approval of Debtor’s Second Amended Chapter 11 Plan.¹ Following confirmation of Debtor’s Second Amended Chapter 11 Plan, United States Magistrate Judge Lawrence J. O’Neill of the United States District Court for

¹ Debtor’s Second Amended Chapter 11 Plan was confirmed by Order entered October 7, 2005. Coast Grain has appealed this Court’s Order confirming the Debtor’s Second Amended Chapter 11 Plan.

the Eastern District of California signed on October 14, 2005, an Order regarding Coast Grain's Motion for Discovery Sanctions wherein Coast Grain was awarded discovery sanctions of \$18,063.50 as against Debtor.² Coast Grain promptly filed the instant request for approval of administrative fees on October 25, 2005. In accordance with Mont. LBR 9013-1, Coast Grain's Motion for Approval of Request for Payment of Administrative Claim is accompanied by a "NOTICE OF OPPORTUNITY TO RESPOND", which reads:

If you object to the motion, you must file a written responsive pleading and request a hearing within ten (10) days of the date of the motion.

* * *

If no objections are timely filed, the Court may grant the relief requested. A failure to respond by any entity shall be deemed an admission that the relief requested should be granted.

Surprisingly, Debtor filed no response to Coast Grain's Motion for Approval of Request for Payment of Administrative Claim. Given the inconsistency in the law, this Court was reluctant to approve the fees on default and thus, the Court sua sponte set the matter for hearing in an Order entered November 8, 2005. In response to setting the matter for hearing, Coast Grain filed a brief on December 8, 2005, and both Coast Grain and Debtor submitted a flurry of exhibits, none of which were offered at the hearing. This Court, however, in Orders entered December 9, 2005, and December 12, 2005, agreed to take judicial notice of Coast Grain's Exhibits 1 and 2, and an Order entered by the United States District Court for the Eastern District of California on December 8, 2005, denying Coast Grain's request for partial summary judgment on Debtor's counterclaim.

² Pursuant to an approved stipulation, the automatic stay was lifted in this case to allow all claims arising out of and related to the dispute between Debtor and Coast Grain to be decided in the United States District Court for the Eastern District of California.

Relying on *Texas Comptroller of Public Accts. v. Megafoods Stores, Inc.*, 163 F.3d 1063 (9th Cir. 1998), *In re Ybarra*, 424 F.3d 1018 (9th Cir 2005) and *Reading Co. v. Brown*, 391 U.S. 471, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968), Coast Grain maintains that the discovery sanction somehow is an actual and necessary cost of preserving assets of the bankruptcy estate. As noted above, although Debtor made a strategic decision to ignore Coast Grain's Motion for Approval of Request for Payment of Administrative Claim, this Court was concerned, after reviewing Coast Grain's Motion, whether the discovery sanction directly and substantially benefitted the bankruptcy estate.

Coast Grain's reliance on *Ybarra* is somewhat suspect in that the Court in *Ybarra* was addressing whether a post-petition award of attorney fees and costs was subject to the debtor's Chapter 7 discharge. The Ninth Circuit Court of Appeals in *Ybarra* agreed with the dissent of the Bankruptcy Appellate Panel in *In re Ybarra*, 295 B.R. 609, 624 (9th Cir. BAP 2003): "The purpose of a discharge is to provide the debtor with a fresh start, which is a different concern from determining administrative priority. The Ninth Circuit has not concluded that the standard for determining administrative expense status under § 503(b) and dischargeability under § 727(b) is the same." *Ybarra*, 424 F.3d at 1025.

Moreover, as explained by the Supreme Court in *Reading Co. v. Brown*, the purpose of the administrative expense priority is to facilitate the operation of the debtor-in-possession's business, with a view to rehabilitation. 391 U.S. at 475, 88 S.Ct. at 1761-62. Notwithstanding the foregoing, the Court agrees with Judge Klein's observation in *Ybarra*, 285 B.R. at 617, that the decisions of the Ninth Circuit pertaining to the issue now before the Court are "unquestionably in disarray." Given the Court's concern that Coast Grain's latest request for fees may be yet another attempt to derail Debtor's Chapter 11 bankruptcy, the Court is reluctant to

rule on whether the discovery sanctions are indeed an administrative expense.

The better course of action, given the litigious posture of the parties, is to defer a ruling on this matter until there is a final resolution in the District Court litigation. At the time of a final ruling, this Court can then decide whether the discovery sanction should be: (1) treated as an offset to any claim awarded Debtor; (2) treated as an administrative expense; or (3) added to any claim awarded to Coast Grain. Accordingly,

IT IS ORDERED that the Motion for Approval of Request for Payment of Administrative Claim filed by Greg Braun, Plan Agent for Coast Grain on October 25, 2005, is DENIED; and Greg Braun, Plan Agent for Coast Grain is granted leave to refile his motion for approval of request for payment of administrative claim once there is a final resolution of the litigation now pending in the United States District Court for the Eastern District of California.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana